No. 80-1310

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

TRANSWESTERN PIPELINE COMPANY,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RESPONDENTS, IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Federal Power Commission (FPC) and/or the Federal Energy Regulatory Commission (FERC) improperly effect changes in the definition of research and development (R&D) for accounting and ratemaking purposes without complying with the notice and comment requirements of the Administrative Procedure Act?

2. Was it improper for the FPC and the FERC to decline to apply additions to the language of an accounting definition in a pending rate proceeding on the grounds that such additions constituted a change in the definition and therefore should have prospective effect only?

3. Did Petitioner have standing as an aggrieved party to obtain judicial review of the action of the FPC and the FERC in a rulemaking proceeding refusing to apply retroactively a change in an accounting definition, where Petitioner had relied on the prior definition in a pending rate proceeding?

4. Under the circumstances of this case was Petitioner denied due process of law?

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*All authorities cited are included in the Appendix to Petition.

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STATEMENT OF THE CASE

Respondents the People of the State of California and the Public Utilities Commission of the State of California

(California) agree with Petitioner's Statement of the Case, with the following exceptions:

1. The several references in the text of the petition at page 8 to "RD&D expenditures", "RD&D treatment", and "RD&D costs" should refer to "R&D" rather than to "RD&D". Each of these references concerns a period of time prior to the June 1977 issuance of FPC Order No. 566, when for the first time the FPC introduced the phrase "research, development and demonstration" into its regulations. Inasmuch as a factual issue at the heart of this case has been whether RD&D is something different from R&D, it is important to recognize that Petitioner's claim before the FPC in its March 1975 rate increase application was that expenses for its coal gasification project should be treated as research and development (R&D) under the FPC regulations then in force.

2. The second quoted paragraph at page 9 of the petition is taken out of context and is therefore misleading. The statement that "this rulemaking does not cancel or alter present practice" appears in Order No. 566 in response to concern that "existing *methods for acceptance of* RD&D costs were being cancelled or altered" (Appendix at 37, emphasis added). This paragraph of Order No. 566 had nothing to do with the definition of RD&D, but rather concerned the *procedure* for qualifying for RD&D ratemaking treatment. Order No. 566 provided a new procedure for allowing advance approval of broad RD&D programs, and this paragraph simply stated that existing procedures for recovering the cost of specific projects would still be available. See Appendix at 37-38.

3. The statement at page 9 of the petition that California, in its application for rehearing of Order No. 566, pointed out that interpretation of that order as a clarification of the R&D definition "would permit Transwestern to prevail in its rate case", is also seriously inaccurate. California in fact stated only that *if* Order No. 566 merely clarified rather than changed the definition of R&D and *if* the new definition of RD&D encompassed Petitioner's coal gasification project, *then* Petitioner *may* be entitled to the advantageous ratemaking treatment it was seeking. (California Petition for Rehearing, R. 239.)

4. The statement at page 10 of the petition that FERC Opinion No. 43 denied RD&D treatment of Petitioner's coal gasification project costs "on the sole basis that its order on rehearing of Order No. 566 . . . was dispositive" is simply wrong. Opinion No. 43 refused to permit the advantageous ratemaking treatment sought by Petitioner because Petitioner failed to sustain its burden of proving that its coal gasification project involved novel, innovative, or experimental technology. The relevance of the orders issued in the rulemaking proceeding must be assessed in the light of that failure of proof.

REASONS FOR DENYING THE WRIT

Petitioner seeks to interest this honorable Court in a fine point of regulatory semantics which two successive administrative agencies resolved patiently and intelligently and which the U.S. Court of Appeals for the Fifth Circuit reviewed with care and discernment. Petitioner asserts that the addition by the FPC of two sentences to an accounting definition of R&D, and its addition of a further

word ("demonstration") to the term being defined, did not "change" the definition but merely "clarified" it. Then Petitioner asserts that the enlarged (but assertedly unchanged) definition should have been applied in resolving a ratemaking dispute turning upon the preexisting accounting term.

The FPC and its successor agency, the FERC, reasonably determined that their accounting rulemaking decision, FPC Order No. 566, should not affect the already pending ratemaking dispute, and that Petitioner's eligibility for advantageous ratemaking treatment for expenditures on a coal gasification project should depend on an interpretation of the accounting rules which were in effect during the entire period to which the rate application applied. The Court of Appeals acted reasonably in sustaining the FPC and FERC decisions, recognizing that the decisions in the rulemaking proceeding did Petitioner no harm, that the accounting definition of R&D applicable to the rate case did not expressly extend as far as Petitioner claimed, and that the FERC therefore acted within the scope of its discretion in denying Petitioner the preferential ratemaking treatment it sought.

The subject dispute is not worthy of review by this honorable Court. The semantic question of "change" or "clarification" of an accounting definition was, as indicated above, not even critical to the decision as to Petitioner's rates, inasmuch as the prior definition applied in either event. If Order No. 566 substantively changed the definition of R&D, then it could not properly be applied retroactively, as both the FPC and FERC recognized. See Order

issued August 3, 1977 (Appendix at 84) and Order issued January 9, 1978 (Appendix at 89). If Order No. 566 did not change the prior definition, then that definition would still apply. The characterization of this mid-1977 rulemaking order was relevant only to the propriety of applying the expanded definition retroactively, an issue which has been raised by no other affected parties and the raising of which becomes less likely with every passing day.

As for Petitioner's rate case decision, there was nothing unusual or precedent-setting about it; the FERC simply determined rates for a locked-in period of 1975 to 1977 based upon its accounting rules in effect at that time. Even the issue of preferential R&D ratemaking treatment for coal gasification project costs has been relitigated by Petitioner in two subsequent rate cases before the FERC, both now awaiting decision (Dockets Nos. RP77-19 and RP 78-88).

Petitioner asserts (see Petition at 11-12) that "an important question of broad applicability" is to be discerned in the Court of Appeals having permitted the FPC and the FERC to "circumvent the notice and comment requirements of the Administrative Procedure Act" by giving prospective-only effect to a regulatory clarification. If there be any substance to Petitioner's claim that the FPC gave inadequate notice of its intentions, the effect could only be to invalidate the original FPC decision, Opinion No. 566, which "clarified" (and expanded) the accounting definition. No interested party has sought that result, least of all Petitioner. This issue, in any event, is less complex than Petitioner attempts to portray it to be; the issue is

simply the adequacy of notice that the FPC would consider revisions in its accounting definition of R&D. A brief review of the Notice of Proposed Rulemaking (see Appendix at 13 *et seq.*) indicates that such revisions were an easily anticipated outcome of that proceeding as announced to all interested parties.

Petitioner claims (see Petition at 13-15) that the Court of Appeals' conclusion, that the utility was not aggrieved by and so lacked standing to obtain review of the rulemaking decisions, was in conflict with applicable precedent. As indicated earlier, however, the "demonstrated fact of injury", to use Petitioner's words, is simply lacking. It was the rate case decision, rather than the prior rulemaking orders, which disposed of Petitioner's request for preferential R&D rate treatment.

Petitioner's further assertion that it has been denied due process harks back to the same issue. In a somewhat garbled paragraph (Petition at 15), Petitioner apparently claims that the FERC pretended its "clarification" of the R&D definition would not affect the rate case but later "invoke[d] that clarification as the sole basis for its decision". As noted above in California's Statement of the Case, this simply is not an accurate description of the FERC's reasons for denying advantageous R&D ratemaking treatment for Petitioner's coal gasification project expenditures. The relevant portions of FERC Opinion No. 43 (Appendix at 103-04) and Opinion No. 14 (Appendix at 142-53) make this clear. Opinion No. 43's denial of R&D treatment, moreover, affirmed the initial decision of an FERC Administrative Law Judge, which contains a pains-

taking analysis of the relevant evidence and of the applicable accounting definition of R&D. Petitioner's due process claim is a specious one.

CONCLUSION

In sum, Petitioner has not demonstrated adequate grounds to warrant granting a writ of certiorari in this matter. The petition should be denied.

March 6, 1981

Respectfully submitted,

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